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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No.

PAUL B. ROBERTS, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF JOSEPH deR. MORENO, DECEASED
(INTERPLEADING DEFENDANT),
Petitioner,

v.

MARJORIE EILEEN BATHURST, EXECUTRIX OF THE ESTATE OF JOSEPH deR. MORENO
(ORIGINAL PLAINTIFF),
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Paul B. Roberts, a citizen of the Commonwealth of Massachusetts, and a resident of Winchester in said Commonwealth, as he is Administrator with the will annexed of the Estate of Joseph deR. Moreno, late of Brookline in said Commonwealth, respectfully shows unto this Honorable Court as follows:

First: The Travelers' Insurance Company, a Connecticut corporation, insured in the sum of Five Thousand Dollars, the life of Joseph deR. Moreno, a Major in the United

States Army, who died in Manila, P. I., October 16, 1936, the policy being payable to the insured's executor or administrator.

Second: In February, 1935, said Joseph deR. Moreno deserted his lawful wife, Therese M. Moreno, at Brookline, Massachusetts, and later went to live at the home of the respondent Marjorie Eileen Bathurst, at Radburn, New Jersey, remaining there until he sailed for the Philippine Islands about January 1, 1936.

Third: On April 21, 1919, Joseph deR. Moreno duly executed a will leaving all his property to his wife, Therese M. Moreno, and appointed her Executrix.

Fourth: On October 18, 1935, he executed at Boston, Massachusetts, another instrument purporting to be his last will by which he left all his property to the respondent Marjorie Eileen Bathurst, and appointed her Executrix.

Fifth: In August, 1936, said decedent obtained a pretended divorce from his lawful wife in the courts of Florida, he never having been in the State during the pendency of the suit, Florida never having been the matrimonial domicile, and no service being made on the wife in the State of Florida, the validity of which divorce has always been denied by the wife under the decision of this Honorable Court in *Haddock* v. *Haddock*, 201 U.S. 562.

Sixth: Immediately after the death of Joseph deR. Moreno, Marjorie Eileen Bathurst probated said will of October 18, 1935 in the State of Florida, in which state the decedent had a future interest in some real estate, but of which state according to your petitioner's belief and the evidence in his possession, said Joseph deR. Moreno was not a resident or citizen at the time of his death, and commenced suit against the Travelers' Insurance Company to recover the amount of said policy, which suit was removed to the United States District Court for the Northern District of Florida.

Seventh: The Travelers' Insurance Company paid the amount of said policy into said United States District Court and asked that the claimants thereto interplead.

Eighth: Believing that the will of October 18, 1935 was executed under the undue influence of Marjorie Eileen Bathurst, your petitioner offered for probate in the Probate Court of Norfolk County, Massachusetts, the will of April 21, 1919. Said Probate Court, after being informed of the execution of the will of October 18, 1935, and after notice to all parties concerned, including Marjorie Eileen Bathurst, adjudged and decreed that the residence of Joseph deR. Moreno at the time of his death was in Brookline, Norfolk County, Massachusetts, admitted the will of April 21, 1919 to probate, and, the executrix named therein having declined, appointed your petitioner administrator with the will annexed of the Estate of Joseph deR. Moreno.

Ninth: Your petitioner duly accepted said trust by giving bond as required by law and his appointment is still in full force and effect.

Tenth: Your petitioner appeared in the United States District Court for the Northern District of Florida and claimed the proceeds of said insurance policy.

Eleventh: The respondent Marjorie Eileen Bathurst moved for a summary judgment under Rule 56, Federal Rules of Civil Procedure, and, although your petitioner filed documentary evidence and affidavits showing that the domicile of the decedent at the time of his death was in Brookline, Massachusetts, including certified copies of decrees of the Probate Court of Norfolk County, Massachusetts and of the District Court of the United States for the District of Columbia, both adjudicating that fact after notice to Marjorie Eileen Bathurst, and the latter decree ordering the assets in the District of Columbia turned over to your petitioner as the domiciliary representative of the estate, said District Court for the Northern District of

Florida entered a summary judgment that said Marjorie Eileen Bathurst was entitled to the fund.

Twelfth: Your petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit, which court on the thirteenth day of June, 1940 affirmed the decree of the District Court with a slight correction, not here material, and on the twenty-fourth day of July, 1940, denied a petition for rehearing.

Thirteenth: In its opinion, the said Circuit Court of Appeals held:

"The insurance is payable to the personal representative appointed at the true domicile at death. . . . The true domicile would be difficult to decide under the evidence in this record. It could not be decided by summary judgment", but held that because the Florida Court which had admitted to probate the will of October 18, 1935, had, over the objections of Mrs. Moreno, decided in favor of the validity of that will (your petitioner not being a party to that proceeding), "Even if Massachusetts can be held the true domicile and he (your petitioner) the payee of the policy, still to avoid circuity of action this court of equity would not pay him the money to take it to Massachusetts and compel Mrs. Bathurst to follow it, subjecting her to an unnecessary burden and the money to unnecessary costs of administration."

QUESTIONS OF LAW INVOLVED.

Although the record contains extraneous matter which has little bearing on the real issues, the real questions of law involved in the decision of the Honorable Circuit Court of Appeals, as above set forth, are as follows:

1. Where an Appellate Court holds that the lower court has erroneously entered a summary judgment under Rule 56, can it proceed to decide the merits of the controversy in favor of the party obtaining such wrong

summary judgment, without either party ever having had the opportunity for a full trial of the issues involved?

2. Can a court, either trial or appellate, ignore the question of a decedent's true domicile, with all which that question involves, and "take a short cut" in favor of one who claims as a legatee money belonging to the decedent's estate?

3. Can a court, by ignoring the question of a decedent's true domicile,

(a) deprive the state of domicile of its right to administer according to its laws the personalty of the decedent?

(b) deprive the state of domicile of its right to collect inheritance taxes?

(c) deprive a widow of her statutory right under the laws of the decedent's domicile (here Massachusetts Revised Laws [Ter. Ed.] Chapter 191, Section 14), to waive any will and claim her share of the decedent's estate, as though the deceased had died intestate?

4. Can a person named executrix in the will of a decedent, by rushing into the courts of any state where a debtor can be served with process, transfer from the state of the decedent's domicile the whole or part of the administration of the decedent's estate?

5. Can a woman in Mrs. Bathurst's position, by bringing in the courts of the state which has granted a divorce, the validity of which is denied under the rules laid down by this Honorable Court, a proceeding where the divorce may be collaterally involved, deprive the courts of other states of the right given them by the decisions of this Honorable Court to refuse to give extraterritorial force to the divorce decree in question, on the ground of lack of bona fide residence?

JURISDICTION OF THIS COURT.

The decree below was rendered June 13, 1940 and is reported in 112 F. 2d 543.

A petition for rehearing was denied on July 24, 1940 and is not, so far as your petitioner knows, reported.

The jurisdiction of this court is invoked under Judicial Code, Sec. 240 (a), 28 United States Code, Section 347 (a) as amended by the Act of February 13, 1925, Chapter 229 (48 Stat. 938).

REASONS FOR THE ALLOWANCE OF THE WRIT.

Your petitioner believes that the decision of the Circuit Court of Appeals, involving as it does a question of conflict of laws and of the application of the "full faith and credit" clause of the United States Constitution, is in conflict with the applicable decisions of this Court and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its power and supervision, as more fully set forth in the annexed brief, in that:

1. The decision nullifies the accepted rule that the personalty of decedent is to be administered by and in accordance with the law of his domicile, and by the executor or administrator there appointed;

2. The decision nullifies the rule that the validity of a will is to be decided by each jurisdiction for itself, and in accordance with its own laws, so far as the will applies to property within that jurisdiction, and that a will valid in one jurisdiction may not be valid in another;

3. The decision nullifies the rule expressly laid down by this Court that if the domicile of Major Moreno and his wife was in Massachusetts when he obtained the Florida divorce, and when he died, any divorce ob-

tained under the conditions here existing is void in Massachusetts under its laws and under the decisions of this Court, and said decision would oblige the lawful widow, if she wished to claim her rights in her husband's estate to litigate the validity of the divorce in the courts of the only state which would feel bound to uphold it and one to whose jurisdiction she had never submitted;

4. To allow a woman who has supplanted a lawful wife in the affections of the latter's husband to rush into the courts of any state she may for reasons advantageous to herself select and subject the administration of the husband's estate to the laws and policies of that state, regardless of the domicile of the decedent and other interested parties, and was done here, is contrary to public policy.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to send to this Court for its review and determination a transcript of the record and of all proceedings in said Court in the case entitled

PAUL B. ROBERTS, as Administrator with the will annexed of the Estate of Joseph deR. Moreno,

v.

MARJORIE EILEEN BATHURST, Executrix of the Estate of Joseph deR. Moreno,

and numbered 9289 on the docket of the said Court, and that said decree of the Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet

and in conformity with said law. And your petitioner will ever pray.

PAUL B. ROBERTS,
Administrator as aforesaid.

FREDERIC GILBERT BAUER,
Counsel for Petitioner,
50 Congress Street, Boston, Massachusetts.

AFFIDAVIT.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, October 22, 1940.

I, Paul B. Roberts, the above petitioner, make oath that I have read the foregoing petition and am acquainted with the contents thereof; and that the facts stated therein are true to the best of my knowledge and belief, my knowledge being derived from my own dealings as administrator, and from examination of the records and depositions in other litigation involving the affairs of Major and Mrs. Moreno and Mrs. Bathurst.

PAUL B. ROBERTS.

Subscribed and sworn to before me this twenty-second day of October, 1940.

MILDRED R. HAGER,
[NOTARIAL SEAL] *Notary Public.*

CERTIFICATE OF COUNSEL.

I, Frederic Gilbert Bauer, a member of the bar of this court, hereby certify I am counsel for the above-named petitioner, and that in my opinion the foregoing petition for a writ of certiorari is well founded as to matter of fact and questions of law, is entitled to the favorable consideration of this court and is not intended for delay.

FREDERIC GILBERT BAUER.

Dated October 22, 1940.